No. 90-1031

(3)

In The

Supreme Court of the United States

October Term, 1990

JACK HALLER,

Petitioner,

v.

DONALD BORROR, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS THE CITY OF COLUMBUS, OHIO, MONTGOMERY, JOSEPH, DAILEY, SNYDER, MATCO, REED AND SEE

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QUESTION FOR REVIEW

Did the United States Court of Appeals for the Sixth Circuit err in affirming the determination of the District Court that Ohio Revised Code Section 2305.10 is Ohio's general or residual statute of limitations for personal injury actions?

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SUMMARY OF ARGUMENT

I. THE EXERCISE OF SOUND DISCRETION REQUIRES DENIAL OF WRIT OF CERTIORARI.

Petitioner wrongly asserts the existence of a conflict among the circuits as no other circuit has addressed which Ohio statute of limitation should be borrowed to carry out the directives of *Owens v. Okure*, 488 U.S. 235, 102 L.Ed 2d 594 (1989). Cases cited by Petitioner followed the *Browning v. Pendleton*, 869 F.2d 989 (6th Cir., 1989) (en banc) rationale and, in Illinois, a close counterpart of O.R.C. § 2305.10 was borrowed. The Wisconsin statutory scheme is different given the judicial gloss previously applied to various statutes of that state.

The selection of Ohio's general or residual statute of limitation for personal injury actions is guided by Ohio's definition of "personal injury." This definition, unchanged for more than sixty years, ought not to be revised and then applied as revised to compel the selection of some statute other than O.R.C. § 2305.10.

II. OHIO REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

"Personal injury" has a specific meaning under Ohio Law. Ohio Revised Code § 2305.10 governs all personal injury actions under Ohio law except libel, slander, and battery which have other more specific statutes of limitation. General tort claims such as loss of consortium and infliction of emotional distress are governed by O.R.C. § 2305.09(D) only because such claims are not personal

injury claims under the law of Ohio. O.R.C. § 2305.09(D) does not govern any personal injury actions in Ohio since it does not govern any action for bodily injury nor does it govern libel, slander, and battery.

ARGUMENT

I. NO SPECIAL OR IMPORTANT REASON EXISTS TO GRANT A WRIT OF CERTIORARI.

Respondent City of Columbus[1], Alphonso Montgomery, Dwight Joseph, David A. Dailey, Robert Snyder, Dennis Matco, O'Reeta Reed, and Michael See (hereinafter referred to collectively as the "Municipal Respondents") respectfully submit that, in the exercise of the sound discretion called for by Supreme Court Rule 10.1, this Court ought to deny the writ of certiorari.

Contrary to the position advanced by Petitioner, there is no conflict between circuits that needs to be addressed by this Court. The statutes involved, O.R.C. §§ 2305.09(D) and 2305.10, have not been the subject of review by any circuit court other than the Sixth Circuit. No circuit court has addressed the issue of borrowing a statute of limitations from the law of the State of Ohio and come to a result contrary to the holding of *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc).

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[1] The City of Columbus is a municipal corporation organized and existing pursuant to its charter and the law of the State of Ohio. It has no parent corporation and no subsidiaries.

Furthermore, the cases from the Seventh Circuit cited by Petitioner either support the logic and result of *Browning* or interpret a different statutory scheme of limitations of actions. *Kalimara v. Illinois Department of Corrections*, 879 F.2d 276 (7th Cir. 1989) applied Illinois's two year statute of limitations for damages for injury to the person to Section 1983 actions arising in Illinois. Just as O.R.C. § 2305.10 applies to actions for "bodily injury," the Illinois statute selected in *Kalimara*, Ill. Rev. Stat. Chapter 110, paragraph 13-202, applies only to "direct physical injury." *Berghoff v. R.J. Frisby Manufacturing Co.*, 720 F.Supp. 649, 652 (N.D. Ill. 1989), citing *Bassett v. Bassett*, 20 Ill.App. 543 (1886).

Another case cited by Petitioner, *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989) addressed the borrowing of a general or residual statute of limitations for personal injury actions from the law of Wisconsin. Wisconsin's statutory scheme is markedly different from that of Ohio in that Wisconsin has a specific statute of limitations for claims such as loss of spousal consortium or other actions for damages "for an injury to the character or rights of another . . . ". 885 F.2d at 407, citing Wisc. Stat. Ann. Section 893.53 (West, 1983). This particular statute of limitations, according to *Gray*, was earlier interpreted by a Wisconsin Court of Appeals to be a general or residual statute of limitations for personal injury actions as is required by *Owens v. Okure*, 488 U.S. 235, 102 L.Ed.2d 594 (1989). *Gray v. Lacke*, 885 F.2d at 408, citing *Segall v. Hurwitz*, 114 Wis.2d 471 (Wis. App. 1983). Ohio Revised Code § 2305.09(D) has never been so labelled as a general or residual statute of limitations for personal injury actions by any court, state or federal.

Furthermore, it would be unwise to review Ohio's scheme of statutes of limitation at this time. As will be seen, *infra*, the selection of Ohio's general or residual statute of limitations for personal injury actions is guided primarily by Ohio's definition of personal injury. Petitioner wrongfully expands on that definition to include general tort claims which are not claims for personal injury under the law of Ohio. *Smith v. Buck*, 119 Ohio St. 101 (1928). As the holding in *Buck* has not been overruled or even questioned by the Supreme Court of Ohio in more than 62 years, this Court should refrain from accepting Petitioner's invitation to redefine "personal injury" under Ohio law and then, as a result of that redefinition, undo the certainty that *Browning* has afforded practitioners litigating Section 1983 claims arising in Ohio.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY DECIDED THAT REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

A. REVISED CODE SECTION 2305.10 IS OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

The Municipal Respondents agree that the decisions in *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235, 102 L.Ed. 2d 594 (1989), require that the trial court apply, as the statute of limitations for an action pursuant to 42 U.S.C. § 1983, the "general or residual statute for personal injury action" in Ohio.

Owens v. Okure, 102 L.Ed. 2d at 606. However, the Municipal Respondents contend that O.R.C. § 2305.10 rather than O.R.C. § 2305.09(D) is that "general or residual statute."

In *Browning v. Pendleton*, 869 F.2d 989 (1989), the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, held:

> . . . . the appropriate statute of limitations for 42 U.S.C. § 1983 civil rights actions arising in Ohio is contained in Ohio Rev. Code Ann. § 2305.10, which requires that actions for bodily injury be filed within two years after their accrual. 869 F.2d, at 992.

This holding has been followed in two decisions reported subsequently. *Thomas v. Shipka*, 872 F.2d 772 (6th Cir., 1989), vacating 829 F.2d 570 (6th Cir., 1987). *Emmons v. McLaughlin*, 874 F.2d 351, 354 (6th Cir., 1989). Accordingly, the law in the Sixth Circuit Court of Appeals has been established for nearly two years that O.R.C. § 2305.10 governs the filing of civil actions arising in the state of Ohio that allege violations of 42 U.S.C. § 1983.

B. REVISED CODE SECTION 2305.09(D) IS NOT OHIO'S GENERAL OR RESIDUAL STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS.

Petitioner wrongly asserts that O.R.C. § 2305.09(D) is that general or residual statute of limitations for personal injury actions. That error results from a misunderstanding of the types of civil actions to which O.R.C. § 2305.09(D) has been applied as the appropriate statute of limitations.

While the Municipal Respondents agree that O.R.C. § 2305.09(D) governs actions for loss of spousal consortium and services [*Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 125 (1936); *Corpman v. Boyer*, 171 Ohio St. 233 (1960); *Dean v. Angelas*, 24 Ohio St. 2d 99 (1970); *Amer v. Akron City Hospital*, 47 Ohio St. 2d 85 (1976); and *Holzwart v. Wehman*, 1 Ohio St. 3d 26 (1982)], loss of a child's services and attendant medical expenses [*Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969); and *Seguin v. Gallo*, 21 Ohio App. 3d 163 (1985)], and infliction of serious emotional distress [*Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131 (1983); *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983); and *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983)], none of those cases ever held, let alone suggested, that the actions being adjudicated were ones for "personal injury" as defined by Ohio law. The opinions uniformly abstain from describing loss of consortium actions or actions for infliction of emotional distress, intentional or negligent, as personal injury actions.

On the contrary, the law of Ohio contrasts consortium claims with other related claims that are, in law, ones for personal injury. In *Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 2d 125 (1936), the Supreme Court of Ohio held:

> Such an action by the husband (for loss of services and for expenses for care and medical attention growing out of his wife's injury) is not one for bodily injury within the meaning of Section 11224-1, General Code, prescribing a two-year limitation, but comes under Paragraph four of Section 11224, General Code, providing for a four-year limitation.

In *Corpman v. Boyer*, 171 Ohio St. 233 (1960), the Court held:

> A husband's *action for consequential damages* occasioned by malpractice of a physician upon his wife is for an injury to his rights not arising on contract or enumerated in the Revised Code sections set forth in paragraph (D), Section 2305.09, Revised Code, and must be commenced within the period prescribed thereby. (Emphasis supplied.)

In *Dean v. Angelas*, 24 Ohio St. 2d 99 (1970), the Supreme Court of Ohio followed *Corpman* and held that an action for consortium is "an action for an injury to the rights of the former spouse (i.e. the plaintiff) not arising upon contract . . . ". 24 Ohio St. 2d, at 100.

In *Amer v. Akron City Hospital*, 47 Ohio St. 2d 85, the Supreme Court of Ohio described the action for loss of consortium, loss of services and medical expenses as one "*for consequential damages* arising from, or having its origin in, alleged acts of malpractice to a plaintiff's spouse." 47 Ohio St. 2d at 87, emphasis supplied, fn. omitted.

In *Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969), the Supreme Court of Ohio held:

> Where a defendant negligently causes injury to a minor child, that single wrong gives rise to two separate and distinct causes of action: *an action by the minor child for his personal injuries* and a *derivative action in favor of the parents of the child for the loss of his services* and his medical expenses. (Emphasis supplied.)

In *Seguin v. Gallo*, 21 Ohio App. 3d 163 (1985), the Court of Appeals for Cuyahoga County likewise labeled the parents' action as "derivative."

In *Schultz v. Barberton Glass*, 4 Ohio St. 3d 131 (1983), the Supreme Court recognized negligent infliction of serious emotional distress without a contemporaneous physical injury as a "cause of action." The opinion never identified this newly-recognized cause of action as one for personal injuries.

In *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983), the Supreme Court of Ohio followed and explained *Schultz*. To be actionable, negligent infliction of serious emotional distress must result in "emotional injuries" that are both serious and reasonably foreseeable. 6 Ohio St. 3d at 72. The opinion never identifies the cause of action as one for personal injuries, nor describes the injuries as anything but "emotional."

In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983), the Supreme Court of Ohio recognized intentional and reckless infliction of serious emotional distress as causes of action. At no time are these causes of action labeled as ones for "personal injury."

The language used in various opinion precludes any thoughtful conclusion that these general tort actions are, instead, actions for personal injury. On the contrary, these are actions: "not one for bodily injury" (*Kraut*); "for consequential damages" (*Corpman* and *Amer*); "for an injury to rights. . . . not arising upon contract" (*Dean*), and actions derivative from those of injured minor children (*Whitehead* and *Seguin*).

C. UNDER OHIO LAW, "PERSONAL INJURY" DOES NOT INCLUDE A LOSS OF CONSORTIUM OR AN INFLICTION OF SERIOUS EMOTIONAL DISTRESS.

This failure to use the label "personal injury" during the forty-seven years between the publication of the

decision in *Kraut* and that in *Yeager* is no fluke or accident. Rather, the failure to use the label is consistent with, and compelled by, the law of Ohio.

In *Smith v. Buck*, 119 Ohio St. 101 (1928), the Supreme Court of Ohio authoritatively defined the phrase "personal injury." The Court held:

> The words "personal injury" as defined by lexicographers, jurists and text writers, and by common acceptance, denote an injury either to the physical body of a person or to the reputation of a person, or to both. 119 Ohio St. at 101.

The two kinds of personal injury in Ohio are injury to the physical body of a person (i.e. bodily injury) and injury to the reputation of a person (i.e. libel and slander). Because libel and slander are governed by a more specific statute of limitations (O.R.C. § 2305.11) and the intentional causing of bodily injury is governed by a more specific statute of limitations (O.R.C. Section 2305.111, for battery [App.-1]), O.R.C. § 2305.10 is, by default, the general or residual statute of limitations for all remaining personal injury actions. Stated another way, O.R.C. § 2305.10 governs *all* personal injury actions as defined in *Buck*, save libel, slander and battery.

Although actions for loss of consortium and for infliction of serious emotional distress are governed by O.R.C. § 2305.09(D), they are not actions for "personal injury" as defined by the law of Ohio. Hence, as loss of consortium and infliction of serious emotional distress are not examples of personal injuries under the law of Ohio, O.R.C. § 2305.09(D) does not govern *any* personal injury actions in Ohio. Ohio's approach, differentiating between personal injuries and other general tort claims, is

buttressed by a recent decision in which the Supreme Court of Ohio wrote: "General tort claims, including those for negligence, are governed by R.C. § 2305.09(D)." *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 179 (1989). Loss of consortium claims and emotional distress claims are governed by Section 2305.09(D) because they are general tort claims and not because they are personal injury claims governed by Section 2305.09(D) as a catchall statute of limitations for personal injury claims.

Although it is sometimes said that O.R.C. § 2305.10 governs only negligence actions alleging bodily injury as damages, that is not the case. O.R.C. § 2305.10 governs *all* actions alleging bodily injury as damages[2] and, for that reason, is the general or residual statute of limitations for personal injury actions in Ohio.

In *Andrianos v. Community Traction Co.*, 155 Ohio St. 47 (1951), the Supreme Court of Ohio held that General Code Section 11224-1, predecessor to O.R.C. § 2305.10,

> . . . providing that an action for bodily injury shall be brought within two years after the cause thereof arose, governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto and it makes no difference whether such action is for a breach of contract or strictly in tort. The limitation is imposed on the cause of action and the form in which the action is brought is immaterial.

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[2] Except battery R.C. § 2305.111 [App.-1].

This use of O.R.C. § 2305.10 and its General Code predecessor as a general statute of limitations for personal injury actions, including actions other than negligence, was followed in *Lee v. Wright Tool & Forge Co.* 48 Ohio App. 2d 148 (1975) motion to certify overruled, 1975. In *Lee*, O.R.C. § 2305.10 was applied to an action for bodily injuries against the seller of a defective hand tool for breach of implied warranty. The Plaintiff-Appellee argued without success that the longer four year statute of limitations for breach of implied warranty under the Uniform Commercial Code as adopted in Ohio should apply. In *Levin v. Bourne*, 117 Ohio App. 269 (1962), O.R.C. § 2305.10 was applied to an action against parents who had signed the driver's license application of their child whose operation of a motor vehicle resulted in bodily injury to the plaintiff. The child's "negligence or willful misconduct" was imputed to the parents by operation of O.R.C. § 4507.07. In choosing the appropriate statute of limitations, the court looked to the nature of the wrong committed (personal injury) rather than the remedy to redress that wrong (action pursuant to a statute creating liability).

In short, O.R.C. § 2305.10 applies to all personal injury actions as defined by Ohio law except for libel, slander and battery which are, in turn, governed by other more specific statutes of limitations for them as particularized types of personal injuries under the law of the State of Ohio.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari ought to be denied. There is no special or important reason to review the choice of O.R.C. § 2305.10 as Ohio's general or residual statute of limitations for personal injury actions.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE SECTION 2305.111

An action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

(A) The date on which the alleged assault or battery occurred;

(B) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(1) The date on which the plaintiff learns the identity of that person;

(2) The date on which, by the exercise of reasonable diligence, he should have learned the identity of that person.